IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 4 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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HASMUKHBHAI C BRAHMBHATT

Versus

SUB DIVISIONAL MAGISTRATE

Appearance:

1. Special Criminal Application No. 4 of 2002

MR NM KAPADIA for Petitioner No. 1

RULE SERVED BY DS for Respondent No. 1

Mr A J Desai, APP for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 05/04/2002

ORAL JUDGEMENT

This is a petition under Article 226 and 227 of the Constitution of India challenging the order dated 27.8.2001 recorded by the Sub-Divisional Magistrate,

Vyara in Surat District directing the present petitioner to furnish a surety in a sum of Rs.6000/- for good conduct and behaviour for a period of one year.

2. It appears from the record that the learned Executive Magistrate, Vyara issued a show cause notice to the present petitioner being Externment Case No.19/2001 which is placed at page no.48. It was issued on 26.5.2001. After the petitioner appeared before him, further proceeding was undertaken and at the end of the proceedings, the learned Magistrate was pleased to find that it was not a case proved on record, that there were cases against the petitioner during a span of last three years and, therefore, no reason to extern the petitioner from the limits of Surat District and, therefore, the Sub-divisional Magistrate, Vyara directed that the notice issued against the petitioner be withdrawn. At the same time, the learned Magistrate also passed an order directing the petitioner to furnish surety in a sum of Rs.6000/- for a period of one year for good conduct and behaviour. Feeling aggrieved by the said order of the Executive Magistrate, the petitioner has preferred this petition before this court. It has been contended by the petitioner that when the externment notice was withdrawn, the Executive Magistrate could not have directed the present petitioner to furnish surety as referred to hereinabove. The petitioner has, therefore, prayed that the aforesaid order is basically illegal and, therefore, deserves to be quashed and set aside. The petitioner has, therefore, prayed to quash and set aside the aforesaid order passed by the learned Executive Magisrate.

3. Rule was issued and in pursuance of the service of notice of rule, Mr A J Desai, learned APP has appeared for the respondent. I have heard the learned Advocates for the parties and have perused the papers. It is very clear from the record that the petitioner was served with a notice under section 56 of the Bombay Police Act to show cause as to why he should not be externed from the limits of Surat City. It appears that the proceedings were undertaken and at the end of the proceedings, the learned Magistrate recorded finding that there was nothing against the petitioner and therefore, he could not be externed from Surat City.

4. The learned Executive Magistrate directed that the notice of externment issued against the petitioner be withdrawn. At the same time, the learned Magistrate directed the petitioner to furnish surety as aforesaid. In the first hand, it is an admitted position that the

petitioner was served with notice of externment only. He was never served with notice of show cause as to why he should not furnish surety. This means that the order passed for furnishing surety is contrary to the notice issued to the petitioner. At the same time, the order for furnishing surety has been passed without issuing notice to the petitioner to show cause as to why he should not furnish surety. Therefore, on both the grounds, the petitioner was directed to furnish surety which is basically illegal. On this aspect of the case, it would be worthwhile to refer a decision of this Court in the case of Koli Dana Nathu v. Sub-Div.Magistrate, Rajkot, reported in 1973 GLR 209 wherein it has been laid down that if an order of the executive authority is attacked as ultra vires order question of exhausting alternative remedy hardly arises. In the present case also, the order in question is basically illegal on the aforesaid two grounds and, therefore, it would not be open to the State to argue that the petitioner should have first filed appeal against the aforesaid order of the Executive Magistrate. Moreover, the provisions for preferring appeal have been enumerated in Section 60 of the Bombay Police Act, 1951, Provision of section 60 states that any person aggrieved by an order made under section 55, 56 or 57 may appeal to the state Government within thirty days from the date of such order.

5. This means that appeal could be preferred provided the order was passed under sections 55, 56 or 57 of the said Act. In the present case, no order of externment has been passed against the petitioner. Therefore, there is no order of the learned Executive Magistrate passed in exercise of powers conferred on him by sections 55, 56 and 57 of the act. When there is no order under those provisions of the Bombay Police Act, the question of filing appeal under section 60 of the said Act does not arise. Therefore, the State cannot plead that the petition under Articles 226 and 227 of the Constitution of India cannot be entertained, when there is effective remedy of appeal has been provided and the said remedy has not been availed of. As said above, the order passed by the Executive Magistrate is not one under section 55, 56 or 57 of the said Act and, therefore, there is no question of preferring appeal under section 60 of the Act. Therefore, this contention may not help the respondent.

6. Another decision relied upon by the learned Advocate for the petitioner can be gathered from the case of Bhagwan alias Ura Ishwar Rana v. Dy.Police Commissioner, Surat, in Special Criminal Application

No.688/89. By disposing of the said matter by order dated 10.12.1984, the Division Bench of this Court has observed that the order is perverse because the appellate authority finds that there is no reason to extern the person, and when the said authority further states that "I am satisfied that there are no sufficient reasons justifying the externment of the said person". The said authority further observed that the said person has not committed criminal or violated the act during the period of two years and, therefore, the said person should show good behaviour and for that purpose he should give surety of Rs.10,000/-. This Court has observed in the said matter that this is unwarranted under the Act. Similar is the case before us. In the present case also the proceedings were started for externment of the petitioner. The learned Executive Magistrate was satisfied that there was no ground to extern the petitioner. In that case the Executive Magistrate could not have passed the order requiring the petitioner to furnish a surety as has been done by him.

7. In above view of the matter, the order directing the petitioner to furnish surety for showing good conduct as indicated in the order is basically illegal. In that view of the matter, the present petition is required to be allowed and the aforesaid order being illegal on the face of it, it deserves to be quashed.

8. For the foregoing reasons, this petition is allowed. The impugned order passed by the learned Sub-Divisional Magistrate, Vyara dated 27.8.2001 in Externment Case No.19/2001 is ordered to be quashed and set aside. Rule is made absolute to the aforesaid extent. D.S. permitted for respondent no.1.

5.4.2002 [D P Buch, J.]
msp